STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC UTILITIES COMMISSION
550 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

March 3, 1995

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20036

Re: Amendment of the Commission's Rules To Preempt State and Local Regulation of Tower Siting For Commercial Mobile Services Providers
Docket No. RM-8577

Dear Mr. Caton:

Please find enclosed for filing an original plus eleven copies of the REPLY COMMENTS BY CALIFORNIA IN OPPOSITION TO CTIA PETITION the above-referenced proceeding.

Also enclosed is an additional copy of this document. Please file-stamp this copy and return it to me in the enclosed, self-addressed, postage pre-paid envelope.

If you have any questions, please call the undersigned at (415) 703-2047.

Very truly yours,

Ellen S. LeVine
Attorney for CPUC

ESL:cip

Enclosures

Before the
Federal Communications Commission
Washington, D.C.

ORIGINAL

In the Matter of	)	
	)	
Amendment of the Commission's Rules To Preempt State and Local Regulation of Tower Siting For Commercial Mobile Services Providers	)	RM-8577

REPLY COMMENTS BY CALIFORNIA IN OPPOSITION TO CTIA PETITION

The People of the State of California and the Public Utilities Commission of the State of California ("CPUC") hereby file these reply comments in support of the comments of Ergotec Association, Inc., the Folks for Appropriate Cellular Tower Sites, the Department of Health of the City of Stamford, and other local and state entities which oppose the petition for rulemaking filed by the Cellular Telecommunications Industry Association ("CTIA") in the proceeding referenced above.

In its petition, CTIA asks the Federal Communications Commission ("FCC") to initiate a rulemaking proceeding in which the FCC would propose to preempt all state and local authority governing the siting of cellular and other communications facilities. As discussed below, preemption of state and local authority is neither warranted as a matter of fact nor of law. CTIA's petition should therefore be denied.

I. CTIA PRESENTS NO EVIDENCE TO WARRANT PREEMPTION OF STATE AND LOCAL AUTHORITY OVER FACILITY SITING

CTIA's petition in support of federal preemption of state and local authority over facility siting identifies no facts or circumstances warranting such action. CTIA cites not a single local siting ordinance or regulation which has "physically delay[ed]" or "prevent[ed]" the siting and build-out of CMRS towers. CTIA Pet. at 13. Nor has CTIA cited a single instance in which a wireless carrier has been aggrieved by local siting regulations. Likewise, CTIA presents no evidence of undue delay, or any cost figures to support its contention of "excessive costs," associated with local siting regulations which have allegedly hampered the deployment of a wireless carrier's facilities. CTIA Pet. at 10, 13.[1]

CTIA further suggests that state or local facilities siting regulation may discriminate between or among similarly situated providers of communications facilities, but again, CTIA cites not a single case or controversy to support that suggestion. CTIA Pet. at 15 n.35. That is not surprising, given that state laws governing the provision of services and facilities by common carriers or public utilities do not permit discriminatory treatment of similarly situated carriers. Any dispute

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1. Similarly, CTIA presents nothing in support of its contention that state or local entities have prescribed certain terms and conditions, unspecified by CTIA, that are "unnecessary and disparate" and that have imposed unspecified "add[ed] costs" on carriers. CTIA Pet. at 10.

alleging such discrimination typically is and will continue to be resolved by the state when necessary.

In short, CTIA offers nothing in support of its claim that state or local entities have exercised their lawful authority to site cellular and other wireless facilities, consistent with the health, welfare, environmental and safety concerns of their citizens, in a manner which has barred or impeded the entry of cellular or other wireless carriers. CTIA's petition is based entirely on conjecture and conclusion, not facts.[2] CTIA has thus failed to support a need to initiate a rulemaking proceeding.

Indeed, had CTIA examined the facts, the facts would have demonstrated graphically that state and local entities have fostered, not hindered, the efficient development of infrastructure necessary to support wireless carriers. In just eleven years in California, thousands of facilities authorized without complaint are in place to serve an estimated two million cellular customers statewide. Rapid deployment of such facilities to serve new customers throughout the state continues. In all of these cases, hundreds of local governments determined, consistent with local community interests in safeguarding the

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2. CTIA's failure to cite any evidence is somewhat surprising given that its members operate throughout the United States, and "include over 95 percent of the licensees providing cellular service to the United States ... as well as the nation's largest providers of enhanced specialized mobile radio ("ESMR") service ... and others with an interest in the wireless industry." CTIA Pet. at 1 n.1.

health, safety and welfare of their citizens, where to place these facilities.[3]

To be sure, the CPUC is aware of only one case during the last ten years in California in which a wireless carrier has filed a formal complaint with the CPUC claiming that a local entity denied the carrier a permit to site its wireless facilities.[4] In that case, the cellular carrier sited its facilities within an apartment in a multi-unit building. The City of San Diego objected to such placement as contrary to the health, safety and welfare of the residents of that building.

However, in the vast majority of cases in which the site proposed by the carrier was deemed incompatible with health, safety, environmental or aesthetic concerns in the community, the local entity typically found an alternative site. For example, the CPUC is aware of cases where a cellular carrier has sought to place its towers in a schoolyard or on a public beach. In these cases, the local entity has properly considered whether such placement is consistent with local zoning laws, and has suggested placement elsewhere to accommodate the carrier.

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3. Local governments in California have similarly approved the siting of countless facilities for other wireless carriers (e.g., dispatch, paging) for decades without impeding the ability of such carriers to rapidly deploy their networks.

4. In recognizing the legitimate interest of local entities to implement zoning requirements governing wireless facilities, the CPUC has delegated authority over the siting of such facilities to local governments. The CPUC, however, retains authority to resolve disputes upon formal complaint.

As the above indicates, wireless carriers have enjoyed wide flexibility from the local entities in siting their facilities. That fact is demonstrated by the extensive deployment statewide of cellular and other wireless networks throughout California. Accordingly, there is no need for the FCC to initiate a rulemaking proceeding to determine whether to preempt such regulations. Nor is there any justification to embroil the FCC in the occasional local zoning dispute governing the siting of wireless facilities, require local governments to expend their scarce resources before the FCC in resolving such disputes, and essentially turn the FCC into a national zoning board.

Finally, it is instructive that in the preemption cases cited by CTIA, the FCC initiated a rulemaking proceeding seeking to preempt certain state and local regulation only after the FCC was presented with numerous examples of concrete controversies involving specific local ordinances and regulations applied in specific circumstances to particular radio operators.[5] CTIA attempts no such showing here.[6]

In sum, CTIA's petition is without merit, and should be viewed as yet another attempt in the cellular industry's ongoing campaign to be free of state and local regulation. The petition lacks any evidentiary basis and is contrary to the legitimate

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5. See, e.g., In the Matter of Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities, 101 FCC 2d 952 at ¶¶4-6 (1985).

6. Moreover, in none of the cases cited by CTIA did the FCC adopt a blanket preemption rule governing state or local siting regulations, as CTIA desires here.

interest of local public entities to exercise oversight of inherently local zoning issues governing the health, safety and welfare of local citizens. The petition should therefore be denied.

II. CTIA IGNORES CONGRESSIONAL INTENT NOT TO PREEMPT STATE AND LOCAL AUTHORITY OVER FACILITY SITING

In enacting the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"), Congress preempted state entry regulation of commercial mobile service providers ("CMRS"). 47 U.S.C. §332(c)(3). Congress, however, expressly provided in the legislative history of the Budget Act that states could continue to regulate the siting of CMRS facilities. Specifically, in the House Report accompanying the Budget Act, Congress stated:

> Section 332(c)(3) provides that state or local governments cannot impose rate or entry regulation on private land mobile service or commercial mobile services; this paragraph further stipulates that nothing here shall preclude a state from regulating other terms and conditions of these services. By "terms and conditions," the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (e.g., zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall with a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."

House Report No. 103-111 at 261, reprinted in 2 U.S. Code Cong. Admin. News 588 (1993) (emphasis added).

The legislative history is unambiguous. Congress did not regard facilities siting issues as a form of entry regulation. Congress instead recognized that such issues were traditionally within the police powers of the state or local governments because the siting of facilities is an inherently local matter affecting the health, safety and welfare of citizens of individual communities. Accordingly, Congress made clear that siting issues should continue to be decided at the state or local levels, not the national level.

CTIA's petition is contrary to congressional intent. While it is true that Congress intended to streamline the regulation of CMRS by preempting state entry authority, Congress did not intend to divest the state or local governments of their historical powers over local zoning issues, including the placement of wireless facilities consistent with health, welfare and safety concerns, notwithstanding that the exercise of such powers may indirectly affect the entry of CMRS.

Indeed, CTIA's construction of the Budget Act is so broad that not only zoning, but virtually any other state regulation of intrastate matters, reserved to the states under Section 152(b) of the Communications Act, could be preempted if all that need be shown is that state regulation affects CMRS entry in some way. For example, notice and hearing requirements governing customer billing disputes; disclosure requirements to fully inform consumers of the services they are receiving; and accounting requirements for CMRS providers to ensure against improper cross-subsidization of intrastate competitive services by consumers, all arguably affect indirectly the entry of CMRS providers. Under

CTIA's theory, such consumer protection measures could thus be preempted. The theory, however, is contrary to congressional intent.

Nine years ago, in California v. FCC, 798 F.2d 1515 (D.C. Cir. 1986), the court overturned a similar theory under which the FCC attempted to preempt state entry authority over radio common carriage (the predecessor of CMRS) offered on FM channels. The FCC's arguments were nearly identical to those offered by CTIA here. In response to the FCC's claims that its actions were "measured," and that the FCC was preempting only state regulation that impedes entry, the court stated:

> This asserted restraint, however, seems belied by the logic of the Commission's arguments. The rationales by which the Commission would justify this preemption proves too much, suggesting a wholesale displacement of state regulation.
>
> Any state regulation of radio common carriage might in some respect burden entry. Moreover, any and all state regulation might trigger the three rationales by which the FCC would justify preemption of additional areas of state authority; i.e. conflict with the Commission's licensing determination, beneficial use of spectrum resources, or impediment to the introduction of competition into radio communication industries. The Commission's logic would thus prepare the way for the complete elimination of any state role in the the regulation of intrastate radio common carriage.

798 F.2d at 1519 (emphasis in original).

Similarly here, the logic by which the CTIA would have the FCC preempt state and local authority over inherently local matters improperly creates a slippery slope for the complete displacement of all state authority over CMRS. As the court made

clear, "...the merit of ... policy arguments for unimpeded entry and free market competition in order to facilitate the beneficial utilization of scarce spectrum resources," must be made to Congress, not to the FCC. California v. FCC, 798 F.2d at 1520.

Accordingly, CTIA's petition is legally defective, and should be denied.

CONCLUSION

For the reasons stated herein, the FCC should deny CTIA's petition to initiate a rulemaking proceeding to preempt state and local authority over siting of wireless carrier facilities.

Respectfully submitted,

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March 3, 1995

CERTIFICATE OF SERVICE

I, Ellen S. LeVine, hereby certify that on this 3rd day of March, 1995 a true and correct copy of REPLY COMMENTS BY CALIFORNIA IN OPPOSITION TO CTIA PETITION was mailed first class, postage prepaid to all known parties of record.

Ellen S. LeVine

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